

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

AHMAD RASHA FULLER,

Defendant and Appellant.

C087375

(Super. Ct. No.  
STKCRFE201716747)

After a Stockton police officer tried to pull him over for a traffic infraction, defendant Ahmad Rasha Fuller fled in a stolen car. He was apprehended a short time after abandoning the car, and was later convicted of evading a peace officer with wanton disregard for safety, unlawfully driving a vehicle, and receiving stolen property. He was sentenced to three years in state prison.

On appeal, defendant contends the trial court abused its discretion in excusing a juror who had difficulty hearing the testimony during trial. Finding no abuse of discretion, we affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

The detailed facts underlying defendant's convictions are not relevant to the issue he raises on appeal. Briefly summarized, in August 2017, a man got off work and saw the teal Honda Accord he had borrowed from a friend being driven out of the parking lot where he worked. Although he reported the car stolen, the report was not immediately processed because the man did not actually own the vehicle.

Several months later, in December 2017, Stockton Police Officer Cody Johnson was on patrol when he was stopped at a red light and heard loud music. The officer looked over and saw a teal Honda Accord next to him and music was playing loud. A man wearing a gray hooded sweatshirt was driving the car.

When the light turned green, the driver of the Honda pulled in front and the officer noticed that the back supplemental brake light was not working. He attempted to stop the car, but the driver fled. The officer followed, and during the pursuit, the driver violated numerous speed limits and ran multiple stop signs. The officer eventually lost sight of the car and stopped his pursuit.

Meanwhile, another officer saw the Honda being driven at a high rate of speed and began following the car. Residents alerted the officer that the Honda had recently passed by, and the officer soon saw a man wearing a light-colored sweatshirt running away from the area. The officer eventually detained the man, who was later identified as defendant.

The first pursuing officer arrived a short time later, and identified defendant as the man he saw driving the Honda, which was found abandoned, parked halfway in the driveway of a residence with its engine still running.

During the first two days of testimony of defendant's trial on April 10 and 11, 2018, the prosecutor called 10 witnesses. There is no indication in the record that Juror No. 6 had any difficulty hearing the testimony of those witnesses.

Before the third day of testimony commenced on April 12, Juror No. 6 provided the court with a note from his doctor stating that he should be temporarily released from jury duty from April 11 through April 13 due to hearing problems. Apparently, Juror No. 6's hearing aid was stuck inside his ear.

When the court inquired about the note and whether the juror was okay to continue, the juror responded, "Are you speaking to me sir? I can't hear you, Your Honor." The court therefore provided Juror No. 6 with an assisted listening device. After having difficulty getting the listening device to attach to his ear, Juror No. 6 commented that it would be easier to dismiss him. Although the court acknowledged it would be easier, the court declined to dismiss him at that time.

After further adjustments, Juror No. 6 confirmed that the listening device worked. The court instructed counsel to use the microphone while questioning witnesses in order to accommodate Juror No. 6. The prosecutor called his first witness of the day and defense counsel later cross-examined him. The prosecutor called his next witness, and defense counsel again cross-examined that witness.

After asking the second witness approximately 35 questions, the court reminded defense counsel that she needed to use the microphone. Defense counsel apologized and asked Juror No. 6 whether he could hear the questions. Juror No. 6 responded, "I haven't heard you ask a question yet." She asked whether he could hear now, and Juror No. 6 did not respond.

The court then asked defense counsel whether the microphone was on; apparently the microphone was malfunctioning. The court instructed the clerk to try to fix it. While the clerk was attempting to fix the microphone, the court asked whether Juror No. 6 had missed any questions. He responded yes. He could not remember the last question he

had heard defense counsel ask, however. He said he remembered hearing the second witness testify that she did not work for the Department of Motor Vehicles (DMV).

The court thus instructed the reporter to read back the testimony from when the witness discussed the DMV. When the court reporter requested the microphone to read back the testimony, the court stated that it had done everything reasonably possible to help Juror No. 6 hear, but that it simply was not working. The court again asked Juror No. 6 whether he was able to hear everything, and Juror No. 6 responded, “Whatever you did with the microphone, I can’t hear you.” Based on his inability to hear all of the questions and answers, the court excused Juror No. 6 over defense counsel’s objection and replaced him with an alternate. Defense counsel continued with her cross-examination and two other witnesses testified before the close of evidence.

The next day defense counsel reiterated her objection to excusing Juror No. 6. She argued that because trial was ahead of schedule, the court could have made further accommodations for Juror No. 6, such as allowing him time to go to the doctor or replacing the batteries in the microphone. The court disagreed, noting that the court’s assisted listening apparatus was working sporadically and then not at all for Juror No. 6. Juror No. 6 had missed significant portions of questions and answers from one witness, and the court had difficulty determining exactly what he had heard and what he had missed. Under the circumstances, and in light of Juror No. 6’s significant hearing difficulties, the court dismissed the juror in favor of an alternate juror.

## DISCUSSION

Defendant contends the trial court abused its discretion in excusing Juror No. 6 during trial before deliberations commenced. We disagree.

A trial court may discharge a juror at any time during trial if the court finds that the juror is “unable to perform his or her duty.” (Pen. Code, § 1089.) Although we review a trial court’s ruling dismissing a juror pursuant to Penal Code section 1089 for abuse of discretion (*People v. Armstrong* (2016) 1 Cal.5th 432, 450), such review

involves a “ ‘heightened standard [that] more fully reflects an appellate court’s obligation to protect a defendant’s fundamental rights to due process and to a fair trial by an unbiased jury.’ ” (*Ibid.*) Thus, “the juror’s ‘inability to perform’ his or her duty ‘must appear in the record as a demonstrable reality.’ ” (*Ibid.*)

“Under the demonstrable reality standard, a reviewing court’s task is more ‘than simply determining whether any substantial evidence in the record supports the trial court’s decision.’ ” (*People v. Armstrong, supra*, 1 Cal.5th at p. 450.) Instead, the test entails “ ‘a more comprehensive and less deferential review. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that [good cause for removing the juror is] established.’ ” (*Id.* at pp. 450-451.) While we do not reweigh the evidence on appeal under the demonstrable reality test, we “ ‘must be confident that the trial court’s conclusion is manifestly supported by evidence on which the court actually relied.’ ” (*Id.* at p. 451.) We consider not only the evidence itself, but also the record of reasons the trial court provided. (*Ibid.*)

“The duty to listen carefully during the presentation of evidence during trial is among the most elementary of a juror’s obligations.” (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411.) Each juror must follow the trial proceedings and evaluate the strengths and weaknesses of the evidence and each side’s arguments so that the jury’s ultimate determinations of the factual issues presented to it may be based on the strongest foundation possible. (*Ibid.*) “Were the rule otherwise, litigants could be deprived of the complete, thoughtful consideration of the merits of their cases to which they are constitutionally entitled.” (*Ibid.*)

Applying the heightened standard of review governing our assessment of the trial court’s decision to discharge a juror under Penal Code section 1089, we conclude, based on an examination of the record as a whole, that the court did not abuse its discretion in discharging Juror No. 6. The juror’s inability to perform his elementary duty as a juror to

hear the proceedings and evidence presented appears in the record as a demonstrable reality.

While Juror No. 6 initially had no problem hearing the testimony the first two days of trial, once his hearing aid became lodged in his ear, he could not consistently hear the proceedings. He provided the court with a note from his doctor temporarily releasing him from jury duty given his hearing problems. Rather than immediately dismissing him, the court tried to reasonably accommodate him by providing the juror with a listening device. The device initially worked sporadically, but later it is clear from the record that it ceased working properly. As a result, Juror No. 6 missed significant portions of the questioning of the second witness that day.

Although defendant argues that only a few pages of testimony had to be read back to Juror No. 6, based on Juror No. 6's comments, we believe the court reasonably could have found that a more extensive and time-consuming read back was required. Juror No. 6 stated that he had not heard defense counsel "ask a single question yet." This statement could reasonably be interpreted to mean that he missed not only defense counsel's 35 questions posed to the second witness, but also defense counsel's entire cross-examination of the first witness who testified that day.

The court's decision to excuse Juror No. 6 given his inability to hear was well within its discretion. That the court did not apply an alternative course of action that might have been available, such as postponing trial until Juror No. 6's hearing issues could be resolved as defense counsel suggested, does not mean the court abused its discretion. (*People v. Bell* (1998) 61 Cal.App.4th 282, 287 [appellate court will not second-guess a trial court's discretionary decisions simply because the trial court did not apply alternative courses of actions that may have been available].) Juror No. 6's inability to perform his duty as a juror appears in the record as a demonstrable reality and replacing him with an alternate juror that defendant chose during voir dire, who could hear all of the testimony, protected rather than hindered his constitutional right to the

complete and thoughtful consideration of the merits of his case. (*Hasson v. Ford Motor Co.*, *supra*, 32 Cal.3d at p. 411.)

#### DISPOSITION

The judgment is affirmed.

/s/  
Robie, J.

We concur:

/s/  
Blease, Acting P. J.

/s/  
Duarte, J.